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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re: BREITBURN ENERGY PARTNERS, LP	**Case No.: 16-11390-smb**
	Chapter 11
Debtor	**(Jointly Administered)**

RESPONSE OF BELLA LOGISTICS LLC TO DEBTORS' OBJECTION TO CLAIM 1899

TO THE HONORABLE STUART M. BERNSTEIN,
UNITED STATES BANKRUPTCY JUDGE:

Now Comes Bella Logistics LLC by and thorough its attorney of record and files this Response to Debtors' Objection to Claim 1899 Filed by Bella Logistics LLC and for cause would show:

Facts

1. On or about July 24, 2013 Bella entered into a Master Work Agreement with Debtor. At that time it was contemplated that Bella would provide goods and services to Debtor pursuant to work orders to be issued by Debtor. In August 2013, Debtor requested that Bella provide goods and services. However, Debtor did not issue a written work order. Bella inquired about a written work order and was told by the Debtor's representative the "Breitburn doesn't issue work orders". Relying on this information Bella began providing goods and services to Debtor in August 2013.

It became a course of dealing for Bella to provide goods and services to the Debtor without a written work order.

2. Between August 2013 and January 2015, Bella provided goods and services on approximately 321 separate occasions. On each and every occasion, a written work order was not issued by Debtor. Notwithstanding the lack of a written work order, Debtor paid Bella's invoice on each and every occasion. Between August 2013 and January 2015, Debtor paid Bella approximately $14,172,184 for goods and services. All without a formal written work order.

3. In August 2015, Bella was instructed by Debtor's representative, Michael Sibble, to provide frac sand at a certain well so work could commence by October 15, 2015. Based upon the course of dealing between Bella and the Debtor, Bella complied with the Debtor's request and had the goods purchased and transported. Bella has not been compensated for these goods and services and is currently owed $3,304,350.24. Contemporaneously with the filing of this response, Bella has filed the Declaration of Barry Holbert Support Bella's Response to Debtor's Objection to Proof of Claim 1899.

Argument

A. Implied Contract

4. A written work order is not required as the Debtor and Bella have an implied agreement to waive the same. Under Texas law[1], an implied agreement, whether arising under common law or the Uniform Commercial Code, exists when the acts of the parties are such as to indicate according to the ordinary course of dealing and common understanding that there is a mutual intention to contract. *Tubelite v. Risica & Sons Inc.* 819 S.W.2d 801, 804-05 (Tex. 1991)(quoting *Preston Farm & Ranch Supply, Inc. v. Bio-Zyme Enters*., 625 S.W.2d 295, 299 (Tex. 1981)); see also Tex.

[1] In the Objection to Proof of Claim 1899 filed by the Debtor, the Debtor acknowledges that Texas law is applicable.

Bus. & Com. Code Ann. § 1.303(b) ("A course of dealing is a sequence of conduct concerning previous transactions between the parties to a particular transaction that is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct.") As the *Tubelite* court stated:

> “Acquiescence to the contract by the party to be charged may be implied from his affirmative actions, such as when he continues to order and accept goods with the knowledge that a service charge is being imposed and pays the charge without timely objection.” Id. at 805.

5. Here, there are numerous "affirmative actions" on the part of the Debtor indicating its agreement to waive the requirement for a written work order. More specifically, from August 2013 through January 2015, Debtor ordered from Bella goods and services on at least 321 different occasions. None of these occasions were supported by a written work order, yet the Debtor accepted each of these shipments and paid Bella accordingly. In fact, between 2013 and 2015, the Debtor paid Bella approximately $14,172,184 for goods and services despite the fact that not one written work order had been issued. This course of dealing is clear evidence that the Debtor and Bella waived the requirement for a written work order.

B. Modification of Contract

6. The same analysis could be used to find that the same conduct "is sufficient to modify the terms of the agreement" to include waiver of the written work order requirement. *Tubelite,* 819 S.W.2d at 804. "Modification of a contract is some change in an original agreement which introduces a new or different element into the details of the contract but leaves its general purpose and effect undisturbed." *Eserch Corp. v. Rebich*, 925 S.W.2d 75, 83 (Tex. App. 1996) (citing *Morgan v. Stover,* 511 S.W.2d 362, 364 (Tex. App. 1974)). "To prove modification, a party must show that the other side (1) had notice of the change and (2) accepted the change." *Omni USA, Inc.*

v. Parker-Hannifin Corp., 798 F.Supp.2d 831, 849 (S.D. Tex. 2011); *Hathaway v. General Mills, Inc.*, 711 S.W.2d 227, 229 (Tex. 1986).

7. As described above, over the course of two and a half years, Bella made numerous shipments of goods at the Debtor's request, all of which the Debtor accepted and paid for. These facts conclusively establish, the post contract formation conduct of Bella and the Debtor is sufficient to modify the terms of the agreement to waive the requirement of a written work order.

C. Quasi Estoppel

8. Furthermore, the Debtor should be estopped from seeking to enforce the requirement for a written work order under a theory of quasi estoppel. The doctrine of quasi estoppel "applies when it would be unconscionable to allow a person to maintain a position inconsistent with one to which he acquiesced, or from which he accepted a benefit." *Clark v. Cotten Schmidt, L.L.P.*, 327 S.W.3d 765, 770 (Tex.App. 2010) (quoting *Lopez v. Munoz, Hockema & Reed, L.L.P.*, 22 S.W.3d 857, 864 (Tex. 2000). In other words, "quasi estoppel forbids a party from accepting the benefits of a transaction . . . and then subsequently taking an inconsistent position to avoid corresponding obligations or effects." *Atkinson Gas Co. v. Albrecht*, 878 S.W.2d 236, 240 (Tex.App.-Corpus Christi 1994, writ denied).

WHEREFORE, Bella Logistics LLC prays the Court enter an order overruling the objection to claim filed by the Debtor, allowing the Claim in full and for all other relief to which Bella may show itself to ne justly entitled.

Dated: June 1, 2017

San Antonio, Texas

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Certificate of Service

I, Morris E. "Trey" White III, do hereby certify that a copy of the foregoing Response was served upon the following in accordance with the General Order M-399:

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